M.K. RETNAM HOLDINGS SDN. BHD. v. BHAGAT SINGH

[S.C. (Hashim Yeop A. Sani, Syed Agil Barakbah & Wan Hamzah S.C.JJ.) February 25 & April 15, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 143 of 1984]

Contract – Building Contract – House not completed and delivery and vacant possession not given – Specific performance – Award of statutory indemnity – Interest – Housing Developers (Control and Licensing) Rules, 1970, r. 12(1) (r).

Housing Developers – House not completed and delivery and vacant possession not given – Specific performance – Statutory indemnity – Interest – Housing Developers (Control and Licensing) Rules, 1970, r.12(1)(r).

In this case the respondent had entered into an agreement with the appellant, a housing developer, for the purchase of a house to be completed within eighteen months from the date of the signing of the agreement, that is by May 2, 1980. The house was not completed by that date. A second agreement was entered into by the parties on July 11, 1981 which provided that the house should be completed within six months from the date of the signing of the agreement and that the purchase price of the house be increased by $3595/-. However the house was again not completed by that date. The respondent brought an action against the appellants and the learned trial judge granted an order for specific performance and an order for statutory indemnity awarded under the Housing Developers (Control and Licensing) Rules, 1970. The appellant appealed. On the appeal it was argued

(1) that the learned judge was wrong in holding that the second agreement was void and of no effect;

(2) that the learned judge was wrong in awarding indemnity at 12% per annum on the full agreed purchase price and not merely on the actual amount already paid by the respondent; and

(3) the learned judge was wrong in awarding interest on the purchase price on a day to day basis as damages.

Held: (1) the second agreement was clearly in violation of the letter and spirit of the Housing Developers (Control and Licensing) Rules, 1970. It was clearly an agreement whose admitted aim it was to defeat the objects of a statute and therefore should not be allowed to stand;

(2) under the Housing Developers (Control and Licensing) Rules, 1970, the indemnity should be calculated at a rate of not less than 8% per annum of the agreed purchase price and the learned judge was therefore right in awarding indemnity at 12% per annum on the full agreed purchase price;

(3) the learned trial judge in this case imposed interest at the rate of 12% per annum and never imposed interest on a day to day basis. It is unjustified to read rule 12(1) (r) of the Rules to require interest to be paid on a daily rest basis.

Case referred to:

(1) *S.E.A. Housing Corporation Sdn. Bhd.* v. *Lee Poh Choo* [1982] 2 M.L.J. 31.

SUPREME COURT.

S.A. Lingam for the appellant.

Hira Singh for the respondent.

Cur. Adv. Vult.

Hashim Yeop A Sani S.C.J. (delivering the Judgment of the Court): The appellant, a housing developer, has appealed against the decision of the learned Judge in granting an order of specific performance of an agreement dated November 3, 1978 entered into between the developer and respondent, one Bhagat Singh s/o Surian Singh, and the order for statutory indemnity awarded under the Housing Developers (Control and Licensing) Rules, 1970.

Bhagat Singh s/o Surian Singh is a retired Hospital Attendant who in the latter part of 1978 booked a house with the developer in view of his retirement. Accordingly the two parties executed a sale and purchase agreement of Lot No. P.T. 13543, Taman Muhibbah, Tg. Rambutan, Perak. The agreement was signed on November 3, 1978. Under this agreement the agreed purchase price was $29,404.50 and the house was to be completed within 18 months from the date of the signing of the agreement, that is by May 2, 1980. But the house was never completed by that date. A second agreement called the "supplementary agreement" was entered into by the parties on July 11, 1981 which provided that the house should be completed within six months from the date of the signing of the agreement and that the purchase price of the house to be increased by $3,585/-. However the house was again not completed by that date and delivery and vacant possession never made to Bhagat Singh s/o Surian Singh.

There are 19 grounds of appeal but only 3 merit some consideration and they are –

(1) that the learned Judge was wrong in holding that the second agreement was void and of no effect;

(2) that the learned Judge was wrong in awarding indemnity at 12% per annum on the full agreed purchase price and not merely on the actual amount already paid by the respondent; and

(3) the learned Judge was wrong in awarding interest on the purchase price on a day to day basis as damages.

As regards the first ground, the learned Judge in his judgment gave two reasons why he considered the second agreement to be void and of no effect. This he said at page 134 as follows:-

"Indeed, the second agreement made on July 11, 1981 was essentially to extend the time, which fact was confirmed in evidence by the defendant themselves. But in the process, the defendant had also been disposed to increase the price, which clearly was in violation of clause 30 of the agreement, since it required the prior certificate of the architect, but no such certificate was ever produced or referred to in that agreement or even adduced in this Court, which thus renders the second agreement void."

But it would seem to us that the validity of the second agreement should be tested in the light of the Housing Developers (Control and Licensing) Rules, 1970. We are of the view that the second agreement is a clear example of "contracting out" of the provisions of the 1970 Rules. The primary object of that legislation is to protect the weak against the strong. See also *S.E.A. Housing Corporation Sdn. Bhd.* v. *Lee Poh Choo.*[1] The position of Bhagat Singh s/o Surian Singh when he signed the second agreement must be one of extreme desperation because by that time he had already retired from service and was renting a house and there had been a delay of more than a year from the due date of delivery of vacant possession under the first agreement. There is also evidence that he had visited the office of the developer not less than 10 times enquiring about his house before he entered into the second agreement. It is also not disputed that by that time he had had already paid $18,440/- of the purchase price. Secondly the Managing Director of the developer company admitted frankly that the real reason for the second agreement was to delay the date of delivery of the house and also to get an increase in the purchase price. He said candidly that he was "not aware of any other reason" for the second agreement – page 54.

Finally it is also not disputed that no attempts were made by the developer to get approval for extension of time from the Controller of Housing under Rule 12(2) of the 1970 Rules. In fact no such application was ever made until after the writ was filed on March 28, 1983 and by that time even the second agreement had lapsed for more than a year. The second agreement is therefore clearly in violation of the letter and spirit of the Housing Developers (Control and Licensing) Rules, 1970. It is clearly an agreement whose admitted aim it was to defeat the objects of a statute and therefore should not be allowed to stand.

We come now to the second ground of the appeal. Rule 12(1) (r) of the 1970 Rules provided for the payment of indemnity for the delay in delivery of vacant possession by the developer:-

"Every contract of sale . . . . shall contain within its terms and conditions provisions to the following effect, namely . . provisions binding on the licensed housing developer that he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of indemnity shall be calculated from day to day at the rate of not less than eight per centum per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale."

This is a provision providing for statutory indemnity. The amount of indemnity shall be arrived at by the following formula namely –

(1) It shall be calculated from day to day;

(2) It shall be calculated at a rate of not less than 8 per centum per annum of the agreed purchase price; and

(3) The period for calculation shall commence immediately after the date of delivery of vacant possession as specified in the agreement.

Thus the purchase price referred to shall be the purchase price specified in the agreement and in this case it is the purchase price as specified in the first agreement between the appellant and Bhagat Singh s/o Surian Singh. It cannot be only part of the purchase price which had been paid by the respondent as that would go against the clear words "purchase price". Moreover it should be borne in mind that this statutory indemnity is an all embracing indemnity and the amount is therefore to be calculated on a fixed sum.

As regards the third ground of appeal the answer is to be found also in Rule 12(1) (r) referred to above. This ground is the result of misreading the rule. The words "day to day" simply means that the amount of indemnity shall be calculated commencing from the due date of delivery of vacant possession as specified in the agreement up to the last day immediately before the *actual* date of delivery of vacant possession. The words "from day to day" are merely to emphasise that the period for the indemnity shall be calculated up to the very last day of default. It has nothing to do with interest. Interest shall be imposed at the discretion of the Judge. In this case the Judge ordered the payment of indemnity and then imposed interest thereon at the rate of 12% per annum

instead of the 14% asked for by the respondent. He gave his reasons at page 10 of the judgment (pg. 141 of record) and we think it is a proper exercise of his discretion. He never imposed interest on a day to day basis.

Finally to clear the doubts created by the arguments between counsel while on the last ground of appeal. We would like to state that it is unjustified to read Rule 12(1) (r) to require interest to be paid on a daily rest basis. It is not only impractical and cumbersome from the point of view of easy calculation but it is also not justified on the language of the Rule. The words used are "day to day" and as stated earlier these words are merely to emphasise the period for calculation of the indemnity. If interest on daily rest basis is intended by the Rule a clearer provision would have been made as such provision would impose a heavier burden on the developer.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *S.A. Lingam & Co.; Asbir, Hira Singh & Co.*

IN RE PANG PO PAH

[R. Cr. J. (Wan Yahya J.), April 29, 1982]

[Malacca – Criminal Revision No. 1 of 1982]

Criminal Law and Procedure – Preliminary enquiry – Duty of Magistrate at – Whether magistrate empowered to commit accused for trial at High Court on charge other than tentative charge – Criminal Procedure Code (F.M.S. Cap. 6) ss. 140 & 141.

Criminal Law and Procedure – Charge – Whether magistrate empowered to commit accused for trial at High Court on charge other than tentative charge – Meaning of "some other Magistrate" in Criminal Procedure Code (F.M.S. Cap. 6), s.140(i)(b) – Whether includes President, Sessions Court.

Jurisdiction – Duty and power of Magistrate at preliminary enquiry – Criminal Procedure Code (F.M.S. Cap. 6), ss. 140, 141 & 177 – Penal Code, s. 304.

On October 21, 1981, pursuant to a preliminary enquiry into an offence of murder under section 302 of the Penal Code, the learned Magistrate at Melaka, purporting to act under Chapter XVII of the Criminal Procedure Code, committed the accused for trial at the High Court not on the tentative charge of murder, as framed by the prosecution, but on a lesser charge under section 304 of the Penal Code. The prosecution felt that the Magistrate had acted in excess of the power conferred by sections 140 and 141 and applied for revision.

Held: (1) an examining Magistrate in a preliminary enquiry may frame charges on any offences triable in the High Court as he finds in the evidence and he may depart from the tentative charge as submitted by the prosecution;

(2) the learned Magistrate may, when the preliminary enquiry evidence discloses an offence triable by a Sessions Court, frame a charge for that offence and, in accordance with section 14(i)(b) read with section 177, transfer the case to be tried by a President of the Sessions Court;

(3) in the present case the learned magistrate had acted improperly by committing a case not ordinarily triable by a High Court to this court for trial;

(4) a *prima facie* case of murder under section 302 of the Penal Code had been made out at the enquiry. The order of the Magistrate should therefore be set aside and he be directed to draw a charge under section 302 of the Penal Code against the accused and to commit the accused for trial to the High Court.

Cases referred to:

1. *Mohamed Kunju* v. *Public Prosecutor* [1966] 1 M.L.J. 271.
2. *R.* v. *Rider* [1954] 1 All E.R. 5, 6.
3. *Goh Swee Joo & Ors.* v. *Public Prosecutor* [1962] M.L.J. 29.
4. *Tan Kim Kang & Ors.* v. *Public Prosecutor* [1962] M.L.J. 388, 389.

CRIMINAL REVISION.

C. W. Chan (Deputy Public Prosecutor) for the Public Prosecutor.

F.H. D'Cruz for the accused.

Cur. Adv. Vult.

Wan Yahya J.: On October 21, 1981, pursuant to a preliminary enquiry into an offence of murder under section 302 of the Penal Code, the learned Magistrate at Melaka, purporting to act under Chapter XVII of the Criminal Procedure Code, committed the accused person for trial at the High Court not on the tentative charge of murder, as framed by the prosecution, but on a lesser charge under section 304 of the Penal Code. The learned Deputy Public Prosecutor, who felt that the Magistrate had acted in excess of the powers conferred by sections 140 and 141, made this application for revision.

At the hearing before this court it was contended by the Deputy Public Prosecutor that section